

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

Robert W. Richardson, II,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 13-0089-CV-W-ODS-P
	)	
	)	
Dean Minor,	)	
	)	
Respondent.	)	

**RESPONSE TO ORDER TO SHOW CAUSE WHY  
A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED**

The Court should deny the petition because Richardson has not exhausted review of his claims in state court. 28 U.S.C. § 2254(b).

**Statement of Custody and Parties**

Named petitioner, Robert W. Richardson, II, is incarcerated at the Moberly Correctional Center in Moberly, Missouri, due to the sentence and judgment of the Johnson County Circuit Court. Richardson pled guilty to two counts of recklessly risking infection of HIV when he was knowingly infected with HIV. The court sentenced him to two concurrent terms of 12 years' imprisonment. Richardson has yet to complete service of these sentences. Named respondent, Dean Minor, Warden of the Moberly Correctional Center, is

Richardson's custodian and is the proper respondent. 28 U.S.C. §2254, Rule 2(a).

### **Respondent's List of Exhibits**

1. Respondent's Exhibit 1 is a copy of the petition for writ of mandamus filed by Richardson on July 23, 2012.
2. Respondent's Exhibit 2 is a copy of the judgment and order of the Circuit Court of Randolph County dismissing the petition for writ of mandamus.

### **Facts**

Richardson pled guilty to two counts of recklessly risking infection of HIV when he was knowingly infected with HIV. He was sentenced to a total of twelve years in the Missouri Department of Corrections. *See State of Missouri v. Richardson*, Case No. 06N2-CR00506-01 (Circuit Court of Johnson County). Richardson filed a Missouri Rule 24.035 motion for post-conviction relief, and the post-conviction court denied the motion. *See Richardson v. State of Missouri*, Case No. 11JO-CV00944 (Circuit Court of Johnson County). Richardson has filed a notice to appeal the denial of the motion. *Id.* Richardson also filed a petition in state court for writ of mandamus related in Randolph County (Resp. Ex. 1). The court dismissed the petition without prejudice (Resp. Ex. 2). Richardson's request for a review of the petition was denied. *See Richardson v. Department of Corrections*, Case No. 12RA-CV00643 (Circuit Court of Randolph

County). On October 9, 2012, Richardson filed a notice to file the petition for writ in the Missouri Court of Appeals, Western District. *Id.*

### **Grounds for Relief**

In this petition, Richardson purports to raise three separate grounds for relief when, in actuality, he is simply restating the same ground three different ways. Richardson's one claim of error is that the Missouri Department of Corrections ("DOC") erred in failing to include the time he spent incarcerated in Kansas under Missouri detainer in calculating his jail time credit for his Missouri sentence when the Kansas conviction was later vacated.

### **Failure to Exhaust**

Federal law bars habeas corpus relief unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To fulfill this requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before presenting those issues in an application for habeas relief in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Gentry v. Lansdown*, 175 F.3d 1082, 1084 (8th Cir. 1999).

Richardson has not exhausted his remedies in state court. He attempted to raise these claims in a petition for writ of mandamus, but Randolph County Circuit Court dismissed the petition without prejudice (Resp. Exs. 1 and 2).

However, Richardson has filed a notice of filing the petition in the Missouri Court of Appeals for the Western District. *See Richardson v. Department of Corrections*, Case No. 12RA-CV00643 (Circuit Court of Randolph County). Furthermore, the petition was dismissed at the circuit court level without prejudice, and Richardson is free to raise it there again.

Richardson seeks additional jail time credit toward his Missouri sentence. The “remedy for seeking [jail time] credit is either through a petition for declaratory judgment against the Department of Corrections or a petition for an extraordinary writ.” *State v. Decker*, 194 S.W.3d 879, 881 (Mo. App. E.D. 2006); *see also, e.g., Timmons v. Missouri Department of Corrections*, 342 S.W.3d 925 (Mo. App. W.D. 2011) (petitioner sought additional jail time credit in declaratory judgment action); *Howard v. Missouri Department of Corrections*, 341 S.W.3d 857 (Mo. App. W.D. 2011) (same); *Burlew v. Missouri Department of Corrections*, 340 S.W.3d 259 (Mo. App. W.D. 2011) (same).

“[B]ecause there remains a presently available state court procedure for determining the merits of his claims, he has not yet exhausted his state remedies.” *Gentry*, 175 F.3d at 1083 (affirming dismissal of federal habeas petition without prejudice where petitioner failed to exhaust state court remedies for jail-time credit claims with declaratory judgment petition). Accordingly, this Court should dismiss the petition without prejudice.

## **Conclusion**

WHEREFORE, for the reasons herein stated, respondent asks that the Court dismiss the petition without further judicial proceedings.

Respectfully submitted,

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## **Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document postage prepaid, this 3th day of May, 2013, to:

Robert W. Richardson, II, 1183485  
Moberly Correctional Center  
P.O. Box 7  
Moberly, MO 65270

\s\ Laura Browne  
Laura Browne  
Assistant Attorney General